REMARKS

Claims 126-149, 151-166, 168-172, 174-176 and 202-204 are presented for examination.

New claims 202-204 are dependent claims.

Claim 154 is amended to correct typographical errors, also present in US 6,552,300 but not in US 2002/0030039.

The Examiner rejects the claims under 35 U.S.C. § 135(b) as being made more than one year after the publication of US 2002/0030039.

Applicants have previously disclosed the Kerner prepublished application, and have also previously addressed the issue now raised by the Examiner.

As previously presented in applicants' 37 C.F.R. § 1.607 statement:

(6) Explaining how the requirements of 35 U.S.C. 135(b) are met, if the claim presented or identified under paragraph (a)(4) of this section was not present in the application until more than one year after the issue date of the patent.

Claims 126-149 claim are not copied from US 6,552,300.

Claims 177-187 are presented less than one year after issuance of US 6,649,863.

Claims 188-201 are not copied from 6,649,863.

35 U.S.C. 135(b)(1) states:
A claim which is the same as, or for the same or substantially the same subject matter as, a claim of an issued patent may not be made in any application unless such a claim is made prior to one year from the date on which the patent was granted.

35 U.S.C. 135(b)(2) states:
A claim which is the same as, or for the same or substantially the same subject matter as, a claim of an application published under section 122(b) of this title may be made in an application filed after the application is published only if the claim is made before 1 year after the date on which the application is published.

Claims 126-149 do not claim "the same or substantially the same subject matter" as the prior published or issued claims, and therefore do not violate 35 U.S.C. 135(b), and are not barred.

On the other hand, 35 U.S.C. 135(a) provides:
Whenever an application is made for a patent which, in the opinion of the Director, would interfere with any pending application, or with any unexpired patent, an interference may be declared and the Director shall give notice of such declaration to the applicants, or applicant and patentee, as the case may be. The Board of Patent Appeals and Interferences shall determine questions of priority of the inventions and may determine questions of patentability. Any final decision, if adverse to the claim of an applicant, shall constitute the final refusal by the Patent and Trademark Office of the claims involved, and the Director may issue a patent to the applicant who is adjudged the prior inventor. A final judgment adverse to a patentee from which no appeal or other review has been or can be taken or had shall constitute cancellation of the claims involved in the patent, and notice of such cancellation shall be endorsed on copies of the patent distributed after such cancellation by the Patent and Trademark Office.

This is a different standard than the bars set forth in 35 U.S.C. 135(b), and therefore a declaration of interference for claims 126-149 is believed proper.

See, Housey v. Berman, Interference No. 104,347 (BPAI 1999); affd., Berman v. Housey 291 F.3d 1345 (Fed. Cir. May 29, 2002); In re Sullivan et al., 2003 US App. LEXIS 24776 (Fed. Cir., December 9, 2003) - UNPUBLISHED; In re Berger, 61 U.S.P.Q.2d 1523 (Fed. Cir. 2002).

Claims 150-176 are believed to be proper based on prior claims presented by applicants in Application Serial No. 10/237,329 filed September 6, 2002; Application Serial No. 09/688,655 filed October 16, 2000; Application Serial No. 09/309,982 filed May 11, 1999; Application Serial No. 08/690,309 filed July 30, 1996.

Thus, applicants have previously asserted that the claims **are not copied** from US 6,552,300 (or 2002/0030039), and therefore do not fall within the strict prohibition of 35 U.S.C. § 135(b). As held by the Federal Circuit Court of Appeals, which has jurisdiction over proceedings in the U.S. Patent Office, an interference may be maintained even though the allegedly interfering claims are not presented within one year of the patent issuance or patent application publication if they do not claim "the same or substantially the same subject matter" as the prior published or issued claims, so long as they meet the 35 U.S.C. § 135(a) test of "interference". The existence of interference under 35 U.S.C. § 135(a) is separate from the issue

of claim copying under 35 U.S.C. § 135(b). Presumably, claims which are in fact copied would compel a determination that interference exists and a one year bar; but such is not the case here.

It is therefore respectfully submitted that claims 126-149, 151-166, 168-172 and 174-176 are not barred under 35 U.S.C. § 135(b), and are therefore allowable.

Respectfully submitted,

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